



THE TEXAS HOUSE OF REPRESENTATIVES  
COMMITTEE ON URBAN AFFAIRS

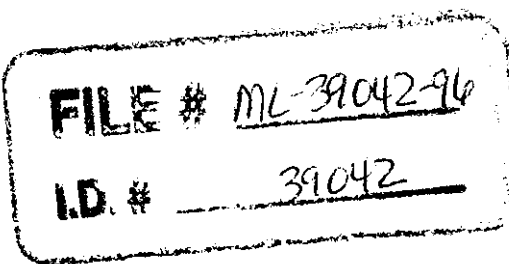
FRED HILL  
CHAIRMAN

July 26, 1996

RECEIVED

AUG 16 1996

Opinion Committee



The Honorable Dan Morales  
Texas Attorney General  
P.O. Box 12548  
Austin, TX 78711-2548

*RD-912*

Dear Dan,

The city councils across Texas share your concern with the dangers of tobacco products, particularly in regard to children who are becoming addicted to nicotine. Children are being bombarded daily with slick tobacco company advertising, including motion pictures in which the heroes and heroines are once again glorifying cigarettes to the advantage of the tobacco industry.

The City of Irving Police Department recently conducted an investigation to determine how many cigarette retailers were selling cigarettes to minors. Minors were employed to purchase cigarettes and eighty percent (80%) of the retailers approached sold cigarettes to the minors.

City councils are concerned that if the majority of cigarette retailers willingly sell cigarettes to minors, there is absolutely no control over minors purchasing cigarettes from untended vending machines.

The City of Irving Health Board has also studied this issue and concluded that the health of the children would be better safeguarded if tobacco products were not available to children through vending machines.

Since the general law prohibiting the sale of tobacco products to children is not working, at least eighty percent (80%) of the time, an absolute prohibition on tobacco product vending machines located in public places is thought to be of great benefit to the public health and welfare of the children of Texas. If children can be kept from becoming addicted to nicotine, the State of Texas will save billions of dollars in the future and thousands, if not millions, of adults will be saved from dying the extremely horrible tobacco death.

With this in mind, city councils wish to adopt ordinances either prohibiting vending machine sales of tobacco products altogether or prohibiting tobacco product vending machines unless they are located within an enclosed area that does not admit any persons under the age of eighteen (18) years of age.

P.O. Box 2910 • Austin, Texas 78768-2910 • FAX (512) 480-0512 • (512) 463-9904

Karyne Jones Conley, Vice Chairman

MEMBERS:

Kevin Bailey • Diana Davila • Harryette Ehrhardt • Todd Staples • Senfronia Thompson • Dale B. Tillery • Beverly Woolley

We elected officials are concerned about the legality of these types of ordinances for the reason that Opinion No. DM-182 concluded cities are preempted by Section 154.101 (h) and 155.041 (h) of the Tax Code from regulating tobacco product vending machines.

Further, there is a general rule of law that if the State of Texas authorizes or permits the operation of a business, municipalities may not prohibit the same business. This theory is set forth in *City of Fort Worth v. McDonald*, 293 S.W.2d 256 (Tex. Civ. App.-Ft. Worth 1956 N.R.E.) and *Gordon v. State*, 757 S.W.2d 496 (Tex. App.-Houston 1st Dist. 1988 Refd). The Court in *McDonald*, in holding the Fort Worth marble table ordinance void wrote:

From time to time, Texas courts have held that municipalities have no power to prohibit pursuit of occupations regulated by state law.

On the other hand, there is a line of cases that hold in construing ordinances the courts must seek to construe the two in a manner to give effect to state law and the ordinance, if possible. *Richardson Responsible Dog Owners of Texas*, 794 S.W.2d 17 (Tex. 1990). Further, the state law under consideration must show with unmistakable clarity that the Legislature intended to limit the power of home rule cities. *City of Dallas v. Dallas Merchants*, 823 S.W.2d 347, 353 (Tex. 1991)

Section 154.101(h) and 155.101(h) Tax Code do not indicate with "unmistakable clarity" that the Legislature intended to prohibit home rule cities from regulating the location of tobacco product vending machines or prohibiting them from public areas.

I have been asked to request an Attorney General's Opinion regarding the authority of home rule municipalities to adopt ordinances either limiting tobacco product vending machines to areas in which children under eighteen (18) years of age are not allowed or the outright prohibition of such vending machines.

If you should conclude ordinances regulating tobacco product sales from vending machines are not permissible under the current state of the law, is it your opinion the Legislature has the legal authority to authorize municipalities to regulate these machines through ordinances?

Your prompt assistance in this matter is appreciated.

Sincerely,

A handwritten signature in cursive script, appearing to read "Fred Hill".

Fred Hill  
FH/dmo